Filed 9/29/09 In re Barry L. CA1/4

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| In re BARRY L., a Person Coming Under the Juvenile Court Law. | |
| SAN MATEO COUNTY HUMAN SERVICES AGENCY,<br>Plaintiff and Respondent,<br>v.<br>BARNEY L.,<br>Defendant and Appellant. | A123662, A124130<br>(San Mateo County Super. Ct. No. 69919) |

In this juvenile dependency matter, the juvenile court denied the requests of appellant Barney L. for a hearing to consider his petition to modify its prior orders and for a contested postpermanency planning hearing. In these consolidated appeals, Barney—the father of minor Barry L.—argues that the juvenile court erred in issuing both of these orders. We affirm the order summarily denying the petition for modification (No. A123662), but reverse the order denying Barney's request for a contested postpermanency planning hearing, remanding the matter to the juvenile court for a contested hearing (No. A124130).

## I. FACTS[1]

The facts of this case are familiar to us, as we have issued several previous appellate opinions in this matter.[2] Appellant Barney L. is the father of Barry, who was born in December 1997. In September 2004, Barry came to the attention of child protective authorities, having displayed significant aggression and violence. As Barney was then incarcerated in state prison with an expected release date of July 2007,[3] he was unable to protect or provide for his son. In November 2004, Barry was declared to be a dependent child and placed in a therapeutic group home. Barney was not offered reunification services because of his ongoing incarceration. (See Welf. & Inst. Code,[4] § 361.5, subds. (b)(12), (e)(1).) By April 2005, seven-year-old Barry was being given psychotropic drugs to help him control his hyperactivity and explosive violent conduct. These drugs were given to him continuously, often over Barney's objection.

Issues of visitation and written communication between Barney and Barry arose frequently in the juvenile court proceedings. Initially, the juvenile court barred physical visitation, but permitted written correspondence between Barry and Barney, if Barry's therapist found this to be in the minor's best interest.[5] At the six-month review hearing

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[1] We have taken judicial notice of numerous earlier appeals involving the same parties. (See Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

[2] Many of these facts are taken from unpublished opinions in these earlier appeals. (*In re Barry L.* (June 16, 2008, A119360); *In re Barry L.* (Apr. 19, 2007, A114699); *In re Barry L.* (Jan. 13, 2006, A111182); *In re Barry L.* (Sept. 29, 2005, A109665).) As Barry's mother is not a party to these appeals, we refer to facts pertaining to her only as they relate to the father's appeals.

[3] Barney has an extensive and violent criminal history, and he has been in and out of state prison for nearly 30 years. In the past, he has been convicted of felony threats to a school official, rape, kidnapping, robbery, false imprisonment, and inflicting corporal injury on a spouse. In 2002, it appears that he was incarcerated for failing to register as a sex offender and for a parole violation. (See Pen. Code, § 290.) Barney was actually paroled in July 2008.

[4] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[5] We rejected Barney's appeal of this ruling in September 2005. (*In re Barry L.*, *supra*, A109665.)

in July 2005, the juvenile court continued to allow Barney to have screened letter contact with Barry, but denied the father's request to have contact visits with his son in prison.[6] In September 2005, at Barney's request, the juvenile court ordered the social worker to provide monthly informal reports to him about Barry's educational and therapeutic progress.

At the 12-month review hearing in October 2005, Barney's request for visitation was again denied. At the 18-month review hearing in February 2006, the juvenile court again ordered that any written contact between Barney and Barry be screened by Barry's therapist. Supervised telephone contact between Barney and Barry was permitted only if Barry's therapist believed that it would be helpful to the minor and in his best interests. The juvenile court adopted long-term foster care as Barry's permanent plan.

In May 2006, Barney had verbal and written confrontations with the social worker about her handling of the case. In June 2006, he sought formal modification of the juvenile court's prior orders. (See § 388.) He complained that the social worker and Barry's therapist were not sending him the monthly reports that the juvenile court had ordered. Barney also asked the juvenile court to compel Barry's therapist to help the minor respond to Barney's letters. According to the therapist, Barry had been hesitant to or had refused to write letters to Barney for many months. At the hearing, the juvenile court denied Barney's request. It reduced the frequency of the social worker's informal reports from a monthly to a quarterly basis.[7] In August 2006, the juvenile court approved Barry's continued placement after a subsequent postpermanency planning hearing.[8]

In January 2007, Barney petitioned the juvenile court for an order compelling Barry's therapist to read the father's letters to the minor, without success. (See § 388.)

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[6] In January 2006, we rejected Barney's appeal of this ruling. (*In re Barry L., supra,* A111182.)

[7] In April 2007, we rejected Barney's appeal of this decision. (*In re Barry L., supra,* A114699.)

[8] Barney appealed the order after this hearing, but the appeal was dismissed after appellate counsel found no issues to raise and the father failed to file his own opening brief.

In the summer of 2007, Barry was transitioned from his group home to a therapeutic foster home for a few weeks, but his unmanageable behavior prompted a termination of this placement. By this time, the minor's medication was being monitored biweekly by a psychiatrist who was treating his mental health issues.

By August 2007, Barry had been placed back in a therapeutic group home. His therapist censored Barney's letters to Barry, finding them to be counterproductive to the minor's treatment. The therapist and the agency asked the juvenile court to terminate this correspondence. The agency also sought to end the requirement that it give informal quarterly reports to Barney. At this time, the juvenile court was advised that Barney was scheduled to be released from state prison in June 2008.

In September 2007, Barney filed an amended petition for modification, again seeking more stringent enforcement of the juvenile court's order requiring informal reports to be provided to him. The juvenile court denied this request. Later that month, the juvenile court conducted the third subsequent postpermanency planning hearing. It heard evidence that Barry did not want to communicate with Barney and that the father's letters were inappropriate. Barney testified that he preferred Barry to be placed with his family rather than with strangers in a foster care setting. He also wanted to reduce Barry's use of medication.

At the conclusion of the hearing, the juvenile court ordered the agency not to provide any further informal reports to Barney and precluded any further contact between him and Barry. It also approved the request for Barry's continued medication, over Barney's objections.[9]

Barry's next subsequent postpermanency planning hearing was conducted in February 2008. At this time, Barney was still incarcerated. The agency reported to the court that Barry did not wish to talk about his father because he did not know him. Although he knew he had the option to write to Barney, Barry has not asked to do so.

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[9] In June 2008, we rejected Barney's appeal of this decision. (*In re Barry L., supra,* A119360.)

Through counsel, Barney requested a contested hearing, but the juvenile court denied this request.

The fifth subsequent postpermanency planning hearing was conducted on July 21, 2008. Barney, who had been released from prison eight days earlier, did attend the hearing. Barry remained in the group home placement and continued to take psychotropic medication. When asked by agency officials on July 9, 2008, he said that he was not interested in having contact with his father and did not want to appear at the hearing. The attorney for Barry's mother spoke on behalf of her client, stating that on July 17, 2008, Barry had told his mother that he did want to come to court and he wanted to have contact with Barney. When asked, Barry's attorney told the juvenile court that her client had told her that he did not want to come to court and had not said that he wanted to visit with Barney.[10] The juvenile court ordered Barry's placement to continue.[11]

In November 2008, Barney petitioned the juvenile court to modify its visitation order and allow him contact with his son. He also asked that Barry be transported to court to be queried in camera about whether or not he wanted to see his father. The juvenile court denied Barney's petition for modification without hearing, finding that the petition did not show that a change of order would be in the best interests of the child. It also denied the request to compel Barry to attend a hearing. Barney filed a timely notice of appeal from the juvenile court's order summarily denying his petition for modification.

In January 2009, the juvenile court held a sixth postpermanency planning hearing for Barry. Again, Barry was asked in advance of the hearing if he wanted to attend and if

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[10] We note that when agency officials again asked Barry about these matters in advance of the next review hearing in January 2009, his response differed from that offered by his mother's counsel and was consistent with that given by his own counsel at the July 2008 hearing.

[11] Barney appealed the juvenile court's failure to continue this hearing for another day in order to allow Barry to appear in court. We dismissed this appeal by order after counsel filed a no-issue letter and Barney failed to file any response. (*In re Barry L.*, A122618.)

he wanted to be in contact with Barney. On both issues, the child said "No." The social worker reported that Barry was adamant about his desire to have no contact with Barney. The father did not attend the hearing, but Barney's counsel objected to the lack of visitation with Barry. Barney's counsel asked that the hearing be set for contest on the issue of visitation, without success. The juvenile court advised Barney to submit a petition for modification if he sought changes to court orders. The juvenile court approved continuing orders that did not allow visitation between father and son. Barney filed a timely notice of appeal from the juvenile court's order denying his request to conduct a contested postpermanency planning hearing. We consolidated this appeal with the appeal from the summary denial of Barney's petition for modification.

## II. PETITION TO MODIFY

First, Barney contends that the juvenile court abused its discretion when it summarily denied his November 2008 petition to modify its no visitation order. (§ 388.) The juvenile court denied the petition without hearing, finding that the petition did not show that it would be in Barry's best interests to change the existing order and allow visitation. On appeal, Barney challenges the summary denial of his petition as a denial of his due process rights.

A parent of a dependent child may petition the juvenile court to change any prior court order on a showing of change of circumstances or new evidence. (§ 388, subd. (a).) The juvenile court must construe the petition liberally in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a) (rule 5.570).) If it appears that the best interests of the child may be promoted by the proposed change of order, the juvenile court must conduct a hearing on the petition. (§ 388, subd. (d);[12] *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.)

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[12] Section 388 was amended, effective January 2009. As the version of subdivision (c) in effect in November 2008 is substantially the same as subdivision (d) in the current version of section 388, we refer to the current statute for convenience. (Compare Stats. 2008, ch. 457, § 2 with Stats. 2000, ch. 909, § 7.)

A parent need only make a prima facie showing in order to trigger a right to a full hearing. To do so, the parent must demonstrate both a genuine change of circumstances or new evidence, and that revoking the prior order would be in the best interests of the child. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079; see *In re Aljamie D., supra,* 84 Cal.App.4th at pp. 431-432; see also rule 5.570(a)(7), (e).) A juvenile court has discretion to deny a petition without hearing only in this limited context, consistent with due process. If the evidence in the petition establishes probable cause to believe that a change of circumstances has occurred and that a hearing would promote the best interests of the child, a hearing must be held. The parent need not demonstrate the probability of prevailing on the petition in order to warrant a hearing. (*In re Aljamie D., supra,* 84 Cal.App.4th at pp. 431-433; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414.)

If a petition fails to make this dual threshold showing—of a change of circumstances or new evidence, and that the requested modification would promote the best interests of the child—the juvenile court may summarily deny the petition. (Rule 5.570(d); see *In re Aljamie D., supra,* 84 Cal.App.4th at pp. 431-432 [citing prior rule of court].) In this matter, the juvenile court found that the petition did not demonstrate that resumption of communications with Barney or compelling Barry to come to court would be in Barry's best interests. Thus, it had the discretion to deny a hearing on the motion on that ground.

On appeal from a juvenile court's summary denial of a petition to modify a prior order, we determine whether the juvenile court abused its discretion to deny a hearing on the petition. (*In re C.J.W., supra,* 157 Cal.App.4th at p. 1079; *In re Jeremy W., supra,* 3 Cal.App.4th at pp. 1413-1414.) We agree with the juvenile court that Barney's petition—even when liberally construed—did not rise to the level of probable cause to believe that the requested change of order would have been in Barry's best interests. The record shows that Barry is an emotionally fragile child facing serious challenges, even with the psychotropic medications that sustain his ability to cope with everyday life; that Barney's past communications with Barry have been detrimental to the child's efforts to cope with his challenging circumstances; and that Barry has repeatedly declined

proffered opportunities to come to court to see his father or to have a relationship with Barney, whom he hardly knows. (Compare *In re Aljamie D.*, *supra*, 84 Cal.App.4th at pp. 432-433 [hearing required when child wishes to live with parent].) Barney persists in believing that he is being deceived about these facts by juvenile court officers and by his child's own attorney, refusing to accept that they have his child's best interests at heart, insisting instead that his strong presence in Barry's life would transform his child's circumstances.

The record supports the juvenile court's view that Barry has no interest in coming to court or in communicating with his father. However much Barney would like the situation to be otherwise, the evidence that he offered in support of his petition for modification did not demonstrate probable cause that a change of the existing no-visitation/no-contact order would be in Barry's best interests. As he did not make a prima facie showing that modification would be in the best interests of the child, the juvenile court acted within its discretion when it summarily denied the petition for modification.

## III. POSTPERMANENCY PLANNING HEARING

Barney also contends that the juvenile court committed reversible error in January 2009 by denying his request to conduct Barry's sixth postpermanency planning hearing as a contested hearing. Barney did not appear on the date set for hearing, but his counsel asked that the hearing be set for contest on the issue of visitation. The court officer—apparently representing the agency—opposed the request, noting that Barry did not desire visitation, that Barney had been ordered not to contact the social worker in Barry's case, and that Barney had been disruptive in the past.[13] The officer noted that Barney intended to cross-examine the author of a new therapist's report and to call other witnesses on his behalf.

The juvenile court denied Barney's request for a contested hearing, noting its familiarity with Barney's wish to have visitation and Barry's refusal to do so. It stated

[13] As Barney had been ordered not to have any contact with the agency, it appears that the court officer appeared in court on the agency's behalf.

that its decision was to respect Barry's wishes. It advised that Barney file a written petition for modification to challenge its orders. On appeal, Barney contends that the juvenile court denied his due process right to a contested hearing. We do not reach the constitutional issue, but conclude that he had a statutory right to a contested hearing.

When a child is placed other than in the home of a legal guardian and juvenile court jurisdiction has not been dismissed, the status of the child must be reviewed every six months. (§ 366.3, subd. (d); *In re Josiah S.* (2002) 102 Cal.App.4th 403, 416; see § 366.3, subd. (h).) As Barry is in long-term foster care rather than legal guardianship and he continues to come under juvenile court jurisdiction, his case requires review every six months under this statutory provision.

Unless his or her parental rights have been terminated, a parent has a right to receive notice of and to participate in this status review hearing. (§ 366.3, subd. (f); *In re Josiah S., supra,* 102 Cal.App.4th at p. 416.) A parent's statutory right to participate in the status review hearing includes a right to challenge agency proposals and proposed court modifications. (*In re Kelly D.* (2000) 82 Cal.App.4th 433, 438-439; see § 366.3, subd. (f).) Thus, a parent has a statutory right to a contested postpermanency planning review hearing. (*In re Josiah S., supra,* 102 Cal.App.4th at pp. 416-417; *In re Kelly D., supra,* 82 Cal.App.4th at pp. 435-438.) The failure to conduct a contested hearing if the parent requests one constitutes a miscarriage of justice. (See, e.g., *In re Kelly D., supra,* 82 Cal.App.4th at pp. 439-440; *In re James Q.* (2000) 81 Cal.App.4th 255, 268; see also Cal. Const., art. VI, § 13; *In re Josiah S., supra,* 102 Cal.App.4th at pp. 417-418.)

We recognize that Barney can be more demanding of the juvenile court system than other parents. However trying he may be, he is entitled to his statutory right to a contested hearing. (See, e.g., *In re Josiah S., supra,* 102 Cal.App.4th at pp. 417-418.) At that hearing, it is presumed that continued care is in the minor's best interests, unless Barney proves by a preponderance of evidence that further efforts at reunification are the best alternatives for Barry. (See § 366.3, subd. (f); *In re Josiah S., supra,* 102 Cal.App.4th at p. 416.) Given the strong evidence in the lengthy record before us of Barry's ongoing determination not to have any contact with Barney and the fragility of

the minor, Barney's case for contact will be difficult to establish. To prove his case, Barney will have the right to testify, to submit evidence, to cross-examine adverse witnesses and to argue his case. (See *In re Josiah S., supra,* 102 Cal.App.4th at p. 417; *In re Kelly D., supra,* 82 Cal.App.4th at p. 440.)

Even at this contested hearing, the juvenile court will have the right to control the proceedings. It may limit the evidence presented to that which is relevant to the visitation issue Barney has posed. It may take steps to prevent the undue consumption of time and may impose other proper restraints on the participants. (See *David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 779; see also Evid. Code, §§ 210, 350, 352.) It need not require the attendance of the minor, if it concludes that it would not be in Barry's best interests for him to be brought to court, particularly in light of his fragile emotional state. The evidence of Barry's desire for contact or not with Barney may be presented by means of a third party, whom Barney would have the right to cross-examine. Then, the juvenile court may judge the credibility of the evidence on this issue and make any appropriate orders regarding whether the existing no-contact order should be kept in place or modified.

## IV. REMITTITUR

The order summarily denying the petition for modification is affirmed. The order after the sixth postpermanency planning hearing is reversed, and that matter is remanded to the juvenile court for a contested hearing on the issue of visitation.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.